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S O M E
O B S E R V A T I O N S
O N A
B I L L

E N T I T L E D,

*An Act for Indemnifying such
Persons as shall upon Examination
make Discoveries touching the Disposi-
tion of Publick Money, or concerning
the Disposition of Offices, or any Pay-
ments or Agreements in Respect there-
of; or concerning other Matters re-
lating to the Conduct of Robert Earl
of Orford.*



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S O M E

OBSERVATIONS

On a B I L L Entituled

An Act for Indemnifying such Persons &c.

THE following Observations have no Relation to the Conduct of the Earl of O——; he is not accountable for the bringing the Bill into one House, nor for rejecting it in the other: One would hope therefore, that the Merits of the Bill may be tried by the Reasons of Justice and Equity, without having the Passions and Prejudices of the Times thrown into the Scale on either Side.

It will be hardly possible indeed in the Examination of the Reasons of the Bill, to avoid taking Notice of some Circumstances in the Earl of O——'s Case, because the Circumstances of his Case are made Use of to justify the Bill; it being evident that extraordinary Circumstances were necessary to countenance and support so very extraordinary a Proceeding; but such Circumstances shall be considered,

red, merely as they relate to the Method of Proceeding, intended to be introduced by this Bill, and not as they tend to accuse or excuse the Conduct of the Earl of O——.

This Bill may properly fall under these Considerations.

1. Whether the Method of Proceeding, introduced by the Bill, be agreeable to the Notions of Justice in general, and to the Temper and Genius of the Law of *England* in particular.

2. Whether the particular Circumstances of the Case to which it is applied, were sufficient to justify so extraordinary a Proceeding.

3. Whether the House of Lords, consistently with their own Honour and Dignity, and the great Trust reposed in them by the Constitution, as Part of the Legislature, and as the Supreme Court of Judicature, could give their Consent to this Bill.

4. Whether this Bill is justified by the Precedents which were alledged in Favour of it.

There are some Observations relating to the Bill, and some particular Provisions therein, which must hereafter be taken Notice of, in considering the Points above stated : It may therefore be not improper to place them here under one View. And,

1. There is an Enquiry after one by Name as a guilty Person, and a new Law proposed on Purpose to detect his Guilt ; but there is no *Constat* of any Crime at all committed, or of any Injury to the Publick. It is said indeed, to be necessary to examine several Persons in relation to the Misapplication, illegal or corrupt Disposition of Money, &c. but no such Misapplications or corrupt Dispositions are charged.

2. Much

2. Much less does the Bill charge any Crime whatsoever on Lord O——.

3. And yet the Enquiry is not carried on in Behalf of the Publick, to discover Frauds and Mismanagements by whomsoever committed ; but it is pointed singly against the Earl of O——, against whom no Charge is brought.

4. The Witnesses, under this Bill, are not indemnified against Crimes which they may confess in the Course of their Discovery ; unless those Crimes affect the Conduct of Lord O——, and are relative thereto.

5. The Discovery (by the Words of the Bill) *may be to either House of Parliament, or to a Committee of either House*—probably it would have been to a Committee of the House of Commons, before which only the Enquiry was depending.

6. If any Person gives false Evidence, or makes a false Discovery, he forfeits the Indemnity ; and is subject to a Prosecution for the Crimes he confesses.

Having made these general Observations, the first Point to be considered, is,

1. Whether the Method of Proceeding, introduced by this Bill, be agreeable to the Notions of Justice, and to the Temper and Genius of the Law of *England* in particular.

It is without Doubt the Interest of the Publick to have Criminals punished, and if this Method is agreeable to natural Justice, it ought to be established by a general Law, and applied to all Cases. How comes it then to pass, that no wise Government has ever made Use of this Method against Criminals in General ?

When Crimes are committed, or Injuries done to the Publick, all Governments have thought it
their

their Business to detect and punish the Guilty. But to enquire after Criminals, when no Crime appears, is inconsistent not only with the Rules of Justice, but the Principles and Maxims of true Policy. Such a Method would disturb the Peace of the World : Every Man would be suspecting, and suspected of all about him ; fearful, not for Crimes committed, but Crimes, which the Iniquity of others, tempted by the Hopes of Reward or Impunity, might lay to his Charge ; and the Law, instead of being a Protector to the Innocent, would become an Instrument in the Hands of the worst Men, to harass and torment the best.

The Weight of these Reasons has introduced a general Rule, that there must be a Certainty of a Crime committed, before a Criminal is sought for. Was a general Indemnity to be proclaimed to all Men upon the Terms of this Bill, who would turn Informers and Accusers, the World would swarm with *Empsons* and *Dudleys* ; Courts of Justice would become mere Courts of Inquisitions ; Mens Lives and Fortunes would be subjected to the Evidence of Criminals, tempted by a Promise of Indemnity ; and under such a general Corruption of Evidence, of all Corruptions the worst, what Justice could ever be expected ?

There wants, I think, no other Proof of the Sense of Mankind in a Case of this Nature, than the general Detestation shewn in all Times and in all Places against those, who for Hire of any Sort become Informers. An Act of Parliament may exempt such Witnesses from Punishment, but from Infamy it cannot save them.

2. With respect to our own Constitution ; nothing can be more contrary to the Spirit and Genius of the Law of *England*, than a Proceeding of this Nature.

Lord

Lord Chief Justice * *Hale* says, a Man may be arrested and held in Custody upon a Suspicion of Felony ; he may be arrested by a private Person, or by an Officer of Justice ; but to warrant the taking him, three Things are required.

1. " There must be in Fact a Felony committed by some Person ; for where no Felony, there can be no Ground of Suspicion.

2. " The Party (if a private Person) that arrests, must suspect B. (*i. e.* the Person arrested) to be the Felon.

3. " He must have reasonable Causes of such Suspicion, and those must be alledged and proved.

What is said here in case of an Arrest by a private Person, is equally true, when the Arrest is by an Officer, acting *Virtute Officii*.

A Constable may arrest a Person suspected of Felony ; but he must examine the Circumstances and Causes of the Suspicion ; he must be sure that a Felony was committed, and, to justify the Arrest and Imprisonment, he must aver in his Plea, that a *Felony was committed* ; and this Fact is issuable, that is, the Person arrested may deny that a Felony was committed, and if the Jury find no Felony committed, the Constable shall be punished for a false Imprisonment.

Mr. Serjeant † *Hawkins* in his Pleas of the Crown, says, " A Justice of the Peace, who grants a Warrant to arrest on Suspicion of Felony, *where no Felony is committed*, or without probable Grounds of Suspicion, is punishable, not only at the Suit of the King, but of the Party grieved.

I will give but one Instance more.

The Law of *England* shews no greater Regard to any thing than to the Life of a Man ; and there

* Hist. P. Cor. Vol. II. p. 78.

† Vol. II. p. 84.

there is an Officer or Officers appointed in every County, whose proper and principal Business it is, to take Inquest touching the Death of Man. But 'till a Man is *actually killed*, those Officers have no Power to enquire. Their Inquest must be *super visum Corporis*, * and, if taken in any other Manner, it is void ; if there is no dead Body to view, there can be no Inquest for Murder.

From these and many other Instances that might be given, it appears how careful the Law of *England* is, not only of the Lives and Fortunes of the Subject, but even of their Credit and Reputation, that they be not attacked and injured upon ill-grounded Surmises and Suspicions. The Law will permit no Man to be put to answer merely because another suspects him, but requires undeniable Evidence that the Crime charged was actually committed by somebody : It requires Proof likewise, that there are probable and reasonable Grounds to suspect the Person accused. Happy is it for us that our Liberties are so well protected ; for what strange Work would it make, if our Fortunes and Reputations were to be put in Danger, whenever others, either wantonly or maliciously spread Suspicions against us.

The Method of Proceeding, introduced by the Bill, is liable to another Objection, which will be best understood by considering, *first*, what Rights of Defence are allowed to Persons under Accusation by common Justice, and the Law of this Country.

Every Person accused is considered, in the Eye of the Law, as innocent till convicted ; and is intitled to the Protection and Assistance of the Law, in the Defence of his Life, Liberty, Fortune or Reputation ; and it would be a manifest Injustice in

* V. Coke, Hale and Hawkins on the Office of a Coroner.

in any Court to deny him any Advantage or Right that the Laws of his Country allow him.

Now, by the Law of all Nations, Witnesses ought to be impartial, disinterested, unbiassed by Threats or Promises ; and it is a just Exception to any Witness, if he wants any of these Qualifications.

By the Law of *England* every Person, put upon his Tryal, may have many legal Exceptions to the Witnesses. The Court, by whom he is to be tryed, is Council for the Prisoner, to see that he has the full Benefit of all the Advantages which the Law gives him. And it is a good Exception to a Witness, that his Interest is any Ways concerned.

“ In all * Cases whatsoever, it is a good Exception against a Witness, that he is either to be a Gainer or Loser by the Event of the Cause, whether such Advantage be direct and immediate, or consequential only.

“ Lord Chief Justice † *Hale* speaks to the same Purpose : Some are disabled to be Witnesses in respect that they are concern'd in Interest.

In Criminal Cases it must be admitted, that Accomplices are sometimes admitted to be Witnesses ; as if a Man confesses a Felony freely, he may be sworn an Evidence against others concerned with him. But the Question is, (with respect to the present Case) how far a Man is disabled, if he comes in as an Evidence upon a *Promise of Pardon*.

To judge rightly of the Law in this Point, it must be consider'd, that there are two Sorts of Objections against Witnesses.

B

I. To

* *Hawkins*, Pl. Cor. Vol. II. p. 433.
Vol. I. p. 302 Vol. II . p. 279.

† *Hist*, Pl. Cor.

1. To their Competency.

2. To their Credibility.

The first Sort of Objections utterly disables them from giving any Evidence at all.

The second Sort does not exclude them from giving Evidence, but does greatly weaken, and utterly destroy the Credibility of their Testimony.

Of Objections to the Competency, the Court is Judge; and if the Objections are proper, the Court will not hear the Witnesses. If the Objections are against the Credibility only, the Court will hear the Evidence, and then the Court or the Jury will judge what Credit is to be given to it.

There has been a Variety of Opinions, whether a Promise of Pardon to induce a Man to give Evidence against another, is an Objection to his *Competency* or not : But it was never doubted but that it is a very material Objection to his *Credibility*.

“ Lord Chief Justice * *Hale* was constantly and
 “ uniformly of Opinion, that the Objection is to
 “ the *Competency*. I will give you his own Words :
 “ If a Reward be promised to a Person for giving
 “ his Evidence before he gives it ; this, if
 “ proved, disables his Testimony ; and so, for
 “ my own Part, I have always thought that if a
 “ Person have a *Promise* of a *Pardon*, if he gives
 “ Evidence against one of his Confederates, this
 “ disables his Testimony, if it be proved upon
 “ him.

He was of the same Opinion in 1662, on the Tryal of some Persons for Treason, for conspiring the King's Death : His Words are ;

“ † The King having promised a Pardon to
 “ RIGGS, if he would discover the Plot, he per-
 “ formed that Part by his Discovery ; and this
 “ was

* Hist. Pl. Coron. Vol. II. p. 280.
 Vol. I. p. 304.

† Hist. Pl. Coron.

“ was held by all no Impediment to his Testi-
 “ mony, for the Promise was not apply’d to *wit-*
 “ *nessing against any other*. But † two *Justices* held,
 “ that if the King promised a Pardon, upon Con-
 “ dition that he would witness against any others;
 “ and that being acknowledged by *Riggs*, when
 “ he took upon him to give Evidence, &c. that
 “ will make him incapable to give Evidence, be-
 “ cause he swears for himself; but in this Point,
 “ the greater Number of the Judges were of a con-
 “ trary Opinion.

You see he makes a Difference between discover-
 ing the Plot in general upon Promise of a Pardon,
 and undertaking to give Evidence against *particular*
Persons; the latter, he thought, *disabled* the Wit-
 ness, because he swore against another Man to save
 his own Life. It is said, indeed, that the greater
 Number of Judges were of a contrary Opinion;
 and true it is, that they did not think that the
 Objection went to the *Competency* of the Witness,
 or hindered the Court from *bearing* his Evidence;
 but they were all of Opinion, that the Objection
 was so strong against the *Credibility* of the Witness,
 that they unanimously advised that no such Evi-
 dence should be made use of. This appears plain-
 ly to have been the Case by * *Keylyng’s Reports*;
 where, after Mention made of Sir *Mathew Hale’s*
 Opinion, it follows, “ *Other Judges did not think*
 “ *the Promise of Pardon disabled him from giving his*
 “ *Evidence: But they all advised, that no such Pro-*
 “ *mise should be made, or any Threatnings used to*
 “ *them, in Case they did not give full Evidence.*

It is plain, from the Opinion of the Judges, that
 they thought all Bargains for *such or such particular*
Evidence, or for *full Evidence*, were illegal; and so
 the Law has been since taken to be. Serjeant

† *Hawkins*, in his Treatise of the Pleas of the Crown, has thus expressed himself: “ *It hath been*
 “ *ruled to be no good Exception, that the Witness hath*
 “ *the Promise of a Pardon or other Reward, on Con-*
 “ *dition of giving his Evidence, unless such Reward*
 “ *be promised by way of Contract for giving such and*
 “ *such particular Evidence, or full Evidence, or any*
 “ *Way in the least to bias him to go beyond the*
 “ *Truth : Which not being easily avoided in Promises*
 “ *or Threats of this kind, it is certain that too great*
 “ *Caution cannot be used in making them.* Upon
 the Whole then, if a Promise of Pardon for giving
 his Evidence does not disable a Witness ; by *his*
Evidence is to be understood *Evidence of what he*
knows, whether it makes for or against the Pri-
 soner ; the Promise therefore must be absolute and
 not *conditional* ; there must be no Bargain what Sort
 of Evidence is to be given, no Contract for *such*
 or *such* particular Evidence, or for *full* Evidence ;
 such a Bargain made with a Witness, would amount
 to a Subornation of Evidence ; and the Law would
 not only reject the Witness, but punish him and
 those who made such an iniquitous Bargain with him.

Let us see now, what Witnesses, and how qual-
 ified, are to be produced under the Provisions of
 this Bill.

1. These Witnesses are induced to give Evidence
 against a certain Person named to them, by the
 Promise of a Pardon ; (that is) they are such Wit-
 nesses as one of the wisest and best Judges of this
 Country thought to be *incompetent*, and such as all
 the Judges, upon the Consultation before mention'd,
 advised should not be made use of even against
 Traytors.

2. This Promise of Pardon is upon a very extra-
 ordinary Condition : The Promise is made, not
 for

for discovering Frauds and Crimes in general, and all Persons guilty of them ; but the Condition is, that the Crimes discovered affect one certain Person named to them, and against whom no Charge is brought. Of such a Proceeding, neither the Law of this Country, nor of any other, can shew an Example. Even the Statutes made to detect Highwaymen, House-breakers, Clippers and Coyners have not gone this Length. They pardon Accomplices in order to obtain a Discovery ; but they do not give the Pardon upon Condition that they accuse *A.* or *B.* The Witnesses are left to discover the Persons guilty, but not directed whom to impeach.

3. Suppose this Condition complied with, and the Person named to them charged by their Evidence ; they should be then, at least one would think, intitled to the Pardon ; but they are not ; for whether the Pardon shall be effectual or not, depends still on a further Condition, for the last Clause in the Bill takes away the Pardon from such Persons, “ *who being examined shall give*
“ *false Evidence, or make any false Discovery touch-*
“ *ing or concerning the said Enquiry and relative*
“ *thereunto.*”

At first Sight this seems to be a very fair Condition, for what can be more reasonable then to require true Evidence and a true Discovery : But consider this in its Consequences, and then judge how fair this Condition is.

1. First then, who is the Judge when the Pardon is forfeited ? Naturally those empowered to take the Examination are Judges of the Behaviour and Sincerity of the Witnesses, and then the Committee or the House of Commons is the Judge, (or at least one of the Judges) whether the Pardon be forfeited or not. I have too much Honour for the Gentlemen of the House of Commons to sus-
pect

pect they would make an undue Use of this Power, and press Witnesses with the Fear of losing the Benefit of the Pardon: But I very much suspect, that the Witnesses themselves will be apt to think, that the surest Way to secure themselves, will be to make their Evidence as full as they can against the Earl of O——. A Witness may know or probably suspect, that others will be examined to the same Facts that he is; should they make a further Discovery than he does, he may apprehend that it will bring him under a strong Suspicion of not having made a true Discovery. How then will this work? Will it not incline him to go the utmost Length to depose all he knows and all he believes, that he may be within the Terms on which the Pardon is granted; *which is granted to those and those only who shall truly and faithfully discover and disclose to the best of his, her or their Knowledge, Remembrance and Belief.* Is this a proper Bias to be put upon Witnesses in order to come at Truth and Justice? Does it not come very near to a Condition, that *they shall give full Evidence*: A Condition before shewed to be illegal, and which by the Law of *England* renders a Witness *incompetent*.

3. As the Enquiry is in order to a Tryal of the Earl of O——, for such Crimes and Misdemeanors as shall be discovered; let us see what Effect this Condition annexed to the Pardon, will have in that Case.

It is the undoubted Right of every Man, who is brought to a Tryal, whatsoever the Crimes charged on him are, to hear the Evidence of the Witnesses produced against him, and to cross examine them; and all Practices, Promises or Threats, which prevent him from having true Answers from the Witnesses, to such Questions as he shall properly ask them, are illegal, and highly injurious

to that Right which the Law has given to every *Englishman* for his just Defence.

Suppose now a Witness, who had made a Deposition before the Committee of the House of Commons, should be brought to give his Evidence again at a Tryal at the Bar of the House of Lords.

The Earl of O—— will have undeniably a right to cross examine him, and to have true Answers to all proper Questions.

But could he hope for such Answers in the present Circumstances of the Witness? Consider, the Witness has been examined before the Committee of the House of Commons; if the Evidence at the Bar of the Lords varies from his Evidence before the Committee, one of them, without doubt is *untrue Evidence*, and then his Pardon is forfeited. To prevent this Mischief to himself, it is absolutely necessary for him to stick close to his first Evidence, and to answer all Questions put to him, so as to make his Answer consistent with the Evidence he had before given. Will it now be to any Purpose for the Earl of O—— to have such a Witness cross examined, or to ask him any Questions, when he may be morally assured, that the more Questions are asked, the stronger would the Evidence be against him; the Witness being under a Necessity to strengthen and support his first Evidence in every Answer he makes. You see now the general State of this Bill: Here is an Enquiry after a Criminal; but no Crime known or alledged; and yet a certain Person named, against whom Witnesses are invited to appear: They are tempted with a Promise of Indemnity for their own Crimes, but upon this Condition, that they discover and charge this Person as a Principal or an Accomplice in their Crimes. Should this Person, in consequence of this Enquiry, be brought to a Tryal, he will

will meet these Witnesses set, prepared and resolute to maintain their first Story, however he may sift and examine or confront them, for their own Safety and Indemnity depend on it. And thus he is in some Degree treated as an *Outlaw*, even before he is accused, by being precluded from the Use of those Means which the Law allows to every Man for his Defence.

I have met with but one Argument in Behalf of this Bill, which pretends to bear any Relation with the Principles of the Law. It is said to be an uncontroverted Maxim of the Law of *England*, “ *that the Publick has a Right to every Man’s Evidence* ; “ and yet by the same Law, *no Man is obliged to* “ *accuse himself*.

And from hence the Inference is, “ *that this Bill* “ *ought to have passed in order to preserve the Rights* “ *of the Publick, and the Rights of the Individuals*. This is very pompous, but has very little Meaning: For the Publick has no more Right to every Man’s, or to any Man’s Evidence, than I have, or any other Subject. Every Man has a Right to every Man’s Evidence, according to Law, and the Publick has no more.

The second Maxim shews, that the first is mistaken ; for if no Man is to accuse himself, the Publick has no Right to oblige any Man to do it, and consequently, in such Case, has no Right to that Man’s Evidence. One who is prosecuted by the King, or the Publick, has the same legal Exceptions to the King’s Witnesses, as he would have to Witnesses produced in a private Cause, and may repel them by proper Exceptions. The Right of the Publick therefore is just the same Right that every Subject has ; that is, to have every Man’s Evidence so far as the Law allows, and no further.

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The Bill therefore would not have preserved this Right of the Publick, for the Publick had no such Right to be *preserved*; but it would have over-ruled and injured the Right of Individuals; and without giving them an adequate Recompence for the Right taken from them. The Act, indeed, secures them against Penalties for the Crimes they shall discover; but is that enough? The Reason why the Law will not oblige a Man to accuse himself of Crimes, is out of Regard to his Credit and Reputation, as well as to the Penalty he may incur; and what Provision is there for this in the Bill, or what can there be? Will any Act of Parliament make one think him an honest Man who proves himself to be a Knave; he must have but a mean Opinion of the Law of his Country, who thinks the Principles and Maxims of it to be so directly contrary to one another, as to want the Interposition of the Legislature, at every Turn to reconcile them.

But if this be indeed the Case, why was not a general Act proposed to reconcile this Difference once for all? We ought to have a consistent Law, and if it is necessary to make it consistent in one Case, why not in all? But had this been attempted, every Man would have been sensible that such a Bill, far from mending the Law, would have been destructive to his Rights and Liberties.

How far the Author of * *a certain Paper* would carry this supposed Right of the Publick, to procure Evidence by Force of an Act of Parliament made on Purpose, I cannot say; but there is a Passage in the next Paragraph, which shews, at least, that he is not yet determined where to stop: For he compares the Power, which the King has to bring Criminals to Justice, by *Evidence*, and the

C

Right

* The Protest.

Right the People have, by the Power of Parliament, *to come at Evidence.*

The King, he says, may bring Criminals to Justice, by Evidence *known to and within the Reach of the Laws.*

The People, in an Enquiry after Crimes which may affect the Being of the Whole, have a Right, he says, *to come at such Evidence as may make that Enquiry effectual to their future Security.*

It is manifest, by the Distinction here made between the Evidence the King may use, [which is described to be legal Evidence and known to the Law] and the Evidence the *People* have a Right to on an *Enquiry*, that he claims a Right in the People to use Evidence *unknown to the Law of England.*

This Way of Reasoning in the Defence of this Bill, is a plain Admittance, that the Bill was intended to set up a new Sort of Evidence, in the present Case, *unknown to the Law* ; and this too, to carry on an *Enquiry* only, before any Crime proved or even alledged ; so that every Subject, if suspected of Crimes, which endanger the Whole (and all Treasons do) whether justly suspected or not, forfeits the Benefit of the Law, and is to be pursued and made a Criminal by a new Sort of Evidence, of what Sort nobody can tell ; for all that is to be learnt of it, is this, it is to be Evidence unknown to the Law ; and such, as may *make the Enquiry effectual to the Peoples future Security.*

This last Circumstance is quite terrible : What, must such Evidence be procured by the Legislature as shall make the *Enquiry effectual*, &c. ? Suppose the People should think the *Enquiry* not made effectual, till Evidence sufficient is procured to convict the Person of the Crimes of which they suspect him to be guilty ; must such Evidence, in all
Events,

Events, be procured by Authority of Parliament ? and have the People a Right to the Exertion of the Power of the Legislature, to come at such Evidence ? God forbid.

Since then, the Method of Proceeding introduced by this Bill, appears for the Reasons given, to be inconsistent in the general View, with the Maxims of natural Justice, and contrary to the Spirit and Genius of the Law of *England* ; let us enquire,

2. Whether the particular Circumstances in the Case to which it is applied, were sufficient to justify so extraordinary a Proceeding. The only Difference that can be imagined between the Case of the Earl of O—— and that of any other Subject, must arise either, from his having been a Minister of the Crown, or, from his particular Conduct and Behaviour during his Ministry.

According to this Division two Questions arise ;

1. Whether it would be reasonable to subject *all Ministers* to such a Proceeding.

2. Whether the particular Circumstances and Conduct of Lord O——, make it reasonable *in his Case*.

The first Question will probably appear to others, as it does to me, to be a very extraordinary one : For what Reason can be assigned, why a Person, advanced to the highest Station of Honour and Dignity, and trusted by the Constitution with the Defence of the Rights and Liberties of others, should immediately forfeit his own, and lose the Protection of the Law of his Country ?

But there is such a Zeal gone out against Ministers, that some have thought the Proceeding a very proper one to be put in Execution *against all Ministers* ; and it is said to be so just, * *That no Innocent Man would desire to avoid it ; and no guilty one*

ought to escape it. Strong Affirmations, without the Support of any Reasons, are liable to be crushed by their own Weight ; and let every Man judge whether this Assertion be of that Kind, as to want no Reasons to support it : It is sent Abroad without any.

There is but one Person in this Kingdom exempted from all Penalties of the Law ; and least this Privilege should turn to the Injury of the Subject, the Law considers his Acts, done contrary to the Direction of the Law, as void and null ; consequently those who are the immediate Instruments, become liable to the Punishment of the Law.

The Law saith, *The King cannot do Wrong* ; because it makes that Act which is against Law, to be none of his. But if the Subject suffers a Wrong by any Act of the Crown, the immediate Instrument must in such Case repair the Damage.

As great Ministers are entrusted with the Exercise of the Power of the Crown, and are accountable to the Publick for any wrong Use made of it ; 'tis natural, 'tis constitutional for the Representatives of the People to keep a watchful Eye over them, and to see, *ne quid detrimenti respublica capiat*.

But still, *if no Wrong is done*, they have no Right to complain ; much less have they a Right, in order to pursue and prosecute *mere Suspicions*, to treat Ministers as if they had no Title to Justice or Law, in common with other Subjects.

Upon what Foot Ministers in general are treated by Writers of a low Form, every Body knows ; and nobody need wonder,

Since a Paper, pretending to be of high Extraction, has, in some Sort, set them upon a Level with Highwaymen and House-breakers, by alledging in Justification of this Bill, the Act of the 5th

of Queen *Anne*, for the Discovery and Conviction of *Burglars* and *Felons*.

If publick Ministers ought to be extirpated out of this Country, as the Law means to extirpate Burglars and Felons; the same Laws which are made against the latter, should be made also against the former. But if the great Offices under the Crown are necessary to this Constitution, to carry on the Affairs of the Publick, and for the well governing the People; if they are exercised (as usually they are) by Persons of the highest Dignity, Honour and Ability; however liable Ministers are to mistake, however subject to Punishment when they *do wrong*; yet, I should hope, the great Difference in the two Cases may exempt them from such Methods of Prosecution, as Necessity alone introduced, and can alone justify against Highway-men and House-breakers.

But tho' the Heat of Contention has in this Case, as it does in most, produced some strange Notions; yet no Man that thinks seriously, would desire to see such a Method of Proceeding established against all Ministers without Distinction.

It remains then to be considered, whether the particular Circumstances and Conduct of Lord O——, made this Proceeding reasonable in his Case.

As there is no particular Charge against him, the Bill cannot be justified by any Act done by him; for no Act of his is so much as alledged to be illegal or Criminal.

All that the Bill pretends to, is an *Enquiry*.

The Question then is reduced to this, What particular Circumstances in his Case, can justify the *Method* of *Enquiry* introduced by this Bill.

All that I have heard upon this Subject, amounts to this; That the Complaints against Lord O——'s Administration,

Administration, are great and general— The Dissatisfaction of the People, universal— in a Word, *That the Voice of the Nation calls aloud for an Enquiry.* Be it so, and let there be an Enquiry. But have the People a Right to desire that the Law should be altered, to make the Enquiry answer their *Expectation*? Or should they desire it, would that be a good Reason for granting it? Is it a proper Step in order to a *fair* Enquiry, to disable the Person suspected from making his just Defence? Is it not tying a Man's Hands behind him, and then calling him to the Combat?

But great Concern is shewed, that the People may not be *disappointed* in their Expectations; in their Call for an *Enquiry*; in their Call for Justice.

It is shocking to hear such Arguments for the Bill; and to hear them from those who would be thought Friends to the Laws and Liberties of their Country. Are the Measures of Law and Justice to be taken from the Expectations of the People? or is the Life, Fortune or Liberty of the meanest Subject, to be made a Sacrifice to a *Popular Call* for Justice? What does this Argument amount to? Is it not plainly saying, as the Law stands, we cannot come at this suspected Person; therefore let the Law be altered; let us invite and encourage all to accuse him, that he may be guilty, and the People satisfied.

I will take it for granted, without asking any Man's Leave, that a general Suspicion may possibly be groundless, that a general Clamour may prevail against an Innocent and honest Minister. Such Cases have been; we have seen such in our Days: Those who succeed us will probably see them too.

If this be the Case, that a general Suspicion may be true, or may be false, it is unreasonable to form
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any Judgment upon Suspicion only ; more unreasonable still to make a new Law for a particular Person, because he is suspected. For a new Law for his Case, must be founded on some Judgment made in his Case ; and for such Judgment, *Suspicion* is no Foundation.

This shews the Nature of the Bill : It is in Truth, *forejudging* the Earl of O——. He is suspected ; *you enquire* ; very well ; but why do you judge of his Case, and make a new Law for his Case, before you have made the Enquiry ? before you can tell, whether the *Suspicion* be well founded, or not ?

Possibly, after all, if the Facts were fully examined, these Jealousies, these general Suspicions may not be owing to the Conduct of the Earl of O——.

Artful Men can, and often do raise Suspicions against Persons who give them no just Grounds for so doing. It ought, at least, to have been the first Enquiry, to know how these Suspicions have been raised. The *Calls* for *Justice*, which came in great Numbers out of the Country, are not a certain Evidence, even of the Sense of the Country. Possibly, they were sent down to the Country, to be returned to those, who knew how to make Use of them. This is no new Invention ; one of the Heathen Emperors began a Persecution by this little Piece of Craft :—*Subornatis legationibus civitatum, quæ peterent ne infra civitates suas Christianis conventicula extruere liceret, ut quasi coactus & impulsus facere videretur, quod erat sponte facturus.*

But admitting the Suspicions to carry some Probability with them, which is a great Concession ; yet why is the Law to be altered to come at the Proof of these Suspicions ?

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It is a very wrong Notion of the Law of a *free* Country, to think that the only or principal View of the Law, is to punish Offenders. The main End of the Law of a *free* People, is to protect the Lives and Fortunes of the Subjects, against the Power of great Men, the Arts of little Men, and the Suspicions of all Men. Let a Prosecution be set on Foot, by the Influence of a great Minister, or the Cunning of a little Attorney, or by general Clamour and Suspicion ;

In every Case, the Law is your Defence. Let others do what they will, and think what they will, in the Eye of the Law you are innocent, till proved guilty ; and therefore, till Conviction, no Advantage or Benefit, which the Law allows, can be taken from you : Now if the Law was indeed provided to protect the Subject in the Cases before mentioned, how contrary to the Constitution of a free Country must it be, to deprive a Man of any Right he has by Law, because he is suspected ? Which is, in Truth, taking away the Right of Defence, merely because there is Occasion to make Use of it.

It has been said, that to deny the Assistance of the Legislature, for the effectual carrying on Enquiries of this Nature, *may prove of fatal Consequence to the Constitution, whenever the Nation shall be visited by a wicked Minister.*

I am very sensible, that Offenders of all Times do often escape Punishment, by a little Art in concealing their Crimes, so as to keep them out of the Way of direct Proof ; and a little Art in managing the Pleas and Exceptions allowed by Law. But this Evil, great as it is, is the *constitutional* Distemper of all free Governments ; and you cannot cure the Disease, without destroying the
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the Patient. If you like a Free Government, you must take it with all its Faults.

If you would distinguish all great Officers and Ministers of the Crown, and put them under a Law, which you like not for yourself, and the rest of your Fellow Subjects; I am afraid the Consequences of taking away the Benefit of the Law from great Men would be, that little ones would not enjoy it long after them. Great Men, who ought to be Guardians of the Laws, would grow unconcerned for those Rights and Liberties, in which they were allowed no Share, and would be ready to take from others, what others had taken from them. I know no Instance of a Government where the great Men were Slaves, and the little ones free. As long as all enjoy the same Liberties, all will unite to support them. And tho' great Men may sometimes escape the Punishment they deserve, by the Lenity of the Laws of a Free Government; yet this Advantage, at least, will arise from it, That all Ministers will have an Interest in preserving the Laws, which help to preserve them from being overborn by the Complaints and Jealousies of the People; which are apt to arise in all Governments, but with the greatest Resentment and Violence in Free Countries.

Though the Reasons already given do sufficiently justify the Lords in rejecting the Bill; yet they had other and very weighty Reasons. Let us see then in the next Place,

Whether the House of Lords, consistently with their own Honour and Dignity, and the great Trust reposed in them by the Constitution, as Part of the Legislature, and as the Supreme Court of Judicature, could give their Consent to this Bill.

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The Commons had proceeded a good Way in their Enquiry, before they sent this Bill to the Lords for their Concurrence ; and they had taken some Steps which the Lords could not approve : And though the Lords may and sometimes do, for the Sake of the Publick, pass over Encroachments of Power by the House of Commons ; yet they never can be so insensible of their own Honour, as to give Countenance to them by a Law of their own making.

The Commons had examined several Persons, in the *most solemn Manner*, as the Phrase is, that is, upon Oath administered by a Justice of Peace : They had too committed one to Prison, for not answering Questions put to him, though he insisted on his Right by Law not to answer Questions that might oblige him to accuse himself.

In this State of Things the Bill was sent to the Lords. All the World knew, (and the Lords could not be ignorant) what Powers the Commons had exercised, without asking the Lords Consent, by any Bill sent to them ; and had the Lords passed this Bill, to give them further Powers, it would have been contrived to be an Acknowledgment of the Powers already assumed.

In the Bill of Indemnity for Sir *Thomas Cook*, there was an express Clause to empower the House of Commons to give an Oath ; which was, on the Part of the Lords, a clear Assertion of their Right to examine on Oath ; and on the Part of the Commons, a clear Concession that they had no such Right. In the present Case, *this Right* was assumed, and yet they expected further Assistance from the Lords to carry on an Enquiry which they had begun, in a Method which the Lords could not but think injurious to their Privileges. Had
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the Lords remonstrated against this Proceeding; it would soon have grown into a Quarrel between the two Houses; the Lords would have been represented as contriving Obstructions to the Enquiry, as patronizing all the ill Conduct and Corruption so much talked of. With respect therefore to the Publick, and to their own Honour, they had no Way left, but to reject the Bill, and leave the Commons to pursue the Enquiry by such Powers as the Constitution gave them; which avoided the Disputes which any other Method would have produced.

The other Instance of Power exercised by the Commons, very much deserved the Attention of the Lords, as it nearly affected the Rights and Liberties of the Subject.

The Bill sent up by the Commons is founded on this known Principle of the Law of *England*, *That no Man is obliged to accuse himself*; for which Reason an Indemnity is proposed for all Crimes the Witnesses shall discover, as far as they relate to themselves. But at the same Time the Bill was before the Lords, there was a Person confined to close Prison for not answering Questions which tended to make him accuse himself. By what Law was this Person imprisoned? If the Law gave him a Right to be silent, whence was the Power derived that punished his Silence? Not from the Law certainly.

In this Situation of Things could the Lords join in an Offer of Pardon to Witnesses, without asking by what Authority they were then under Punishment? Could they by their Silence make a Sacrifice of the Law of their Country, and the Rights and Liberties of their Fellow Subjects? Or could it be expected they should give their Consent

to the Indemnity proposed to the Witnesses, which had never been asked to their Punishment? Or could they do it, without being understood by all the World to approve the Methods already taken.

The Lords, in this Case, had no Choice left, but either to expostulate with the Commons for their Proceedings, to the Obstruction of publick Business, at a Time when Affairs at Home and Abroad required their utmost Attention and Unanimity; or to leave them to pursue their own Methods; but without giving them Assistance by a Bill of so extraordinary a Nature.

The Commons, as Representatives of the People, claim to be the great Conservators of their Liberties: But I refer it to any Man of Sense to determine, upon the View of these Proceedings, to which House the People of *England* have been most obliged, in the present Case, for maintaining their Rights and Liberties.

Besides these Reasons which concerned the Lords, as Part of the Legislature, they had others to consider as they are a Court of Judicature. The Enquiry in the House of Commons, and this Bill in Consequence of it, took their Rise from the general Complaints and Suspicions of the People. Allow these Complaints and Suspicions to be a just Reason for the Commons, who are Prosecutors of publick Crimes, to enquire into the Truth of the Crimes suspected; yet would it be in neither House a just Ground for punishing or setting a Mark of Disgrace upon the Person suspected, before any Crime or Misdemeanor proved. In the House of Lords such a Proceeding would have been absurd and quite out of Character. It is not consistent with common Sense for Judges to punish
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before they hear and examine, and have weighed the Merits of the Cause and Person.

It will be said perhaps the Bill laid no Penalty on Lord O——. Is it then no Penalty to be singled out *by Name* in an Act of Parliament as a great *Criminal*? If the Bill did not consider him as a *Criminal*, why did it call for the *Accomplices* of his *Crimes* to be Evidence against him? Why did it tempt them with a Promise of Indemnity to themselves, provided they accused him? Would the Parliament treat one in this Manner whom they thought innocent? If not, it is plain they judged him guilty whom in this Manner they treated; and would a Court of Judicature come into such Judgment before Tryal, nay, before Accusation?

Suppose but for a Moment, that News was brought you, that there was a Bill in Parliament going on against you by *Name*, which invited all Men to give Evidence of all Crimes you had ever committed; would you not say, *What have I done to deserve this Treatment?*

The asking of which Question shews, that natural Sense tells every Man, that such a Bill ought not to pass but against a notorious Criminal; and had the Lords passed the Bill, all the World would have understood it as a Declaration of their Judgment, that the Person named in the Bill was a notorious Offender; and indeed, it would have been adding the Authority of the House of Lords to all the popular Rumours; a Confirmation of the Suspicions of the People; and what is worse, an Anticipation of the Judgment they were to give as a Court of Justice.

The Lords might have tried this Person afterwards, but it would have been a Solemnity carried

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on with an ill Grace, after such a Judgment given upon the Case beforehand.

It is incumbent on every Court to see that the Person brought before them, has all the Aid the Law allows him for his Defence. One undoubted Right he has, is to cross examine Witnesses : And if it was known to any Court, that a Witness had resolved to give no Answers, or no true ones on a Cross Examination, he would be set aside entirely, and not suffered to give any Evidence at all.

The Bill would have taken away this Right, or the Benefit of it, for Reasons already mention'd, and which need not be repeated ; and could this Supreme Court of Justice, consistently with their own Honour and Dignity, take away this necessary Means of Defence, from a Person against whom they had received no Charge ?

Suppose the Bill had passed, and been followed by an Impeachment, and that at the Tryal Lord O—— had excepted against the Witnesses, as not being at Liberty to answer his Questions, inasmuch as they were bound under the Penalty of forfeiting the Indemnity, to adhere to their Evidence given before the Committee : Would not this have been a reasonable and a legal Objection ? What must the Lords have done ? Reject the Witnesses ? No ; they had themselves put the Witnesses under that Condition, by consenting to the Bill. Where then had been the Subjects Right to have impartial Witnesses, free to answer as well for as against the Person under Prosecution ?

The Bill would have disabled not only the Person accused from making his just Defence ; but it would likewise have disabled the House of Lords in the Exercise of their own Judicature.

A Court of Justice has something more to do than merely to hear Witnesses repeat their Story: They are to call upon them to explain their Evidence, where it is dark or imperfect; and where Witnesses differ to examine them closely, and, if need be, separately, to come at the Truth; to observe their Behaviour, their Consistency in their Evidence, which may, and often is put to the Proof by proper Questions. But can any Thing of this be done, where Witnesses come bound under Penalties to maintain the Evidence they had before given in another Place?

In *Sir Thomas Cook's Case*, the Bill of Indemnity sent from the Lords, appointed the Examination to be at the Bar of the House of Lords. The Commons objected to it; and it came to a Compromise to have the Examination before a joint Committee of both Houses? So careful were the Lords not to suffer Witnesses to be tyed down by an Examination on Oath in another Place, without the Presence of the Lords by themselves or their Committee. By the Bill, now under Consideration, the Commons might, and undoubtedly would have examined by themselves.

In a Word, had the Lords passed the Bill, they must have submitted and consented to all the previous Steps taken by the Commons, however contrary they appeared to the Dignity of their own House, or the Liberty of the Subject. They must have prejudged the Case of Lord O——, and by their Authority given Weight and Credit to all the popular Reports and Suspicions before Tryal and Examination. They must have disabled Lord O—— from making Use of the Means allowed him by Law in his own Defence. They must have disabled themselves, in a great Measure at least,

least, from discharging the great Trust reposed in them, as the Supreme Court of Judicature.

The only Question now remaining is; Whether this Bill is justified by the Precedents alledged in Favour of it.

The Precedents alledged are, the Cases of Sir *Thomas Cook*, the *Masters in Chancery*, Sir *Robert Sutton*, *Thompson*, and others.

I will not enter into the Circumstances of these Cases, with Hopes of engaging the Reader's Attention, to Stories forgotten by most, and in which few have any Concern. Besides, if the Reasons given against this Bill have that Weight in them, which they appear to me to have, the Argument from Precedents comes too late; for no Precedent can justify a Proceeding inconsistent with the common Rules of natural Justice, the Law of the Land, and the Constitution of the Country.

I shall therefore only mention some particular Differences between this Bill and all others, and leave the Reader to compare the Cases more minutely at his Leisure.

1. In this Bill there is no *Constat* of any Crime committed: The Enquiry is at large, not for the Author of a *certain known Crime*; but after the *unknown Crimes* of a *certain Person*.

In other Cases, it was not so. Sir *Thomas Cook* was charged with a great Sum of Money unaccounted for, and which he had *refused* to account for, though *called* upon so to do; This was a plain Fact and Misdemeanor.

In the Case of *the Masters in Chancery*, the Monies of Widows and Orphans, paid into the Court were embezzled, and a very great Sum wanting; which was a Breach of Trust of the highest Nature. That the Fact was so, was not denied.

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The Case of *the Charitable Corporation* was, *mutatis mutandis*, just the same.

The Directors or Trustees of the Company had abused their Trust ; many Families were actually ruined. The Crime was but too apparent.

In all these Cases the Crime was certain ; and the Enquiry was, not to *find* a Crime, but to find the Author : A proper and legal Proceeding.

2. This Bill is an Invitation to all Persons to bring *any* Accusation against *one* Person *named* to them. No Fact, no Crime specified to which they are to apply their Evidence ; but a Person is named ; and *any* Evidence, if it be against him, is sought after.

In the other Cases, the Witnesses were not called upon to accuse a Person named to them for *any*, or *all* the Evil he ever did ; but to make Proof of Facts certainly alledged.

In Sir *Thomas Cook's* Case, the Fact was plain, he had the Money, had refused to account, no Evidence was required but of the Disposal of the Money ; without naming any Person to be accused of receiving it.

In the Case of the Masters in Chancery, the Fact was clear ; the Money gone :

The only Evidence required, was to shew what became of the Money ; and by whose Fault the Deficiency happened ?

In the Case of the Charitable Corporation it was just the same : The Fact undeniable ; the Proprietors ruined ; The only Question, By whose Means ?

3. In this Bill, the Indemnity to the Witnesses is limited to such Things as they shall discover *touching the Enquiry* (into the Conduct of the E—
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of O——) and *relative thereunto* ; so that if their Evidence affects not *him*, it will not save them.

4. The Pardon is conditional likewise. If it should be judged that they made a false Discovery, &c. the Pardon is forfeited. How this Condition would operate, has been already explained.

Compare then these Precedents, and this Bill in these Particulars, and judge whether they can justify or support the Method of Proceeding, introduced by this Bill.

As to the Argument from Precedents in general, it is of great Weight in ascertaining the Law, where the Law is founded in Custom and Usage ; and therefore Precedents have great Authority in the Common Law of *England*. It is of great Weight also, in expounding and determining the Sense and Meaning of written Laws ; and therefore long and uniform Practice upon Statute Law, is of great Use to discover the true Meaning and Intention of Acts of Parliament : But in political Laws, made for particular Purposes, and relative to particular Cases and Circumstances, Precedents are not of equal Authority, for many Reasons : Laws made for particular Cases, depend on the Circumstances of those Cases only ; and as two Cases rarely agree in all Circumstances, a Law proper in one Case, may be a very improper Precedent for making the same Law in another. But above all, it is to be considered, that enormous and distemper'd Times have sometimes produced very bad Precedents, and very unfit ever to be followed.

Resentment and Indignation have a great Share in such Laws ; and it will be very absurd to propose, what was an Effect of the Passion of former Ages, as a Precedent, to direct the Reason and
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Judgment of succeeding Times. Look into the Reign of *Hen. VIII.* and the Beginning of *Edw. VI.* see how Parliamentary Prosecutions were carried on ; and say, whether you like the Precedents. Witneses and Evidence were looked on as Things of Form, and often laid aside ; and many of the first Quality suffered, without ever having an Opportunity of answering for themselves.

Some other Precedents have been alledged in the present Case, such as the 9th of *George I.* forbidding all Persons to *promote an East India Trade in the Austrian Netherlands* ; and the 5th of *Queen Anne*, for discovering *Burglars* or *Felons* : But these Precedents are very different from this Bill. The Laws here referred to, are *preventive* Laws, intended to discourage and put an End to some wicked or pernicious Practices for the future. But this Bill is a Law, *ex post facto*, to discover and punish past Offences. The Legislature, in making *preventive* Laws, act by Rules of *political* Prudence ; and if, to prevent and stop some growing Evils, they make new and severer Laws, every Man has Notice before-hand, to avoid the Difficulty and Severity of the Law, by avoiding the Crimes. But past Offences, in a free Country, do not fall under political Considerations, but legal ones, and must be tryed by the known Laws of the Constitution. It is dangerous to leave the Path marked out to us by the Law, and to resort to political Reasons in the Administration of Justice. Nobody can tell where such Proceedings will stop.

It has been said in Justification of this Bill, that the Publick has a Right to Truth, and to *all the Means of coming at it* : But to what Lengths will this reasoning carry us ? Suppose the Bill had
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passed, and had not proved *an effectual Means* to come at the Truth ; what must have been the next Step ? In some Countries Racks and Tortures of all Kinds are used as proper Means to discover Truth ; and they were introduced by this very Way of Reasoning, because the Publick had a Right to Truth, and to the *Means of coming at it*. I will not ask any *Englishman*, how he would like to see *these Means* for discovering *Truth*, brought into this Country.

But I wish those, who have a Zeal for the Liberties of their Country, would confine the Operations of it, within the Limits prescribed by the Constitution.

By this Means our Home-Divisions might be ended, or carried on without Danger to the Publick. Differences in Opinion, with respect to Publick Affairs, and Opposition of Parties, are natural to free States, and contribute, perhaps, to their Health ; as Winds and Storms purge the Air, and keep it from Stagnation : But they must be contained within Bounds, and not suffered to break through the Fence of the Laws, which the Constitution has set round us, and which have in all Times been found the best Security of the Liberties of this Country.



F I N I S.

